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No. 82-25

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT A. JONES, ET AL., PETITIONERS

v.

RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION TO VACATE AND REMAND

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The Solicitor General, on behalf of the Secretary of Health and Human Services, moves that the judgment of the court of appeals be vacated and the case remanded for reconsideration of petitioners' claims for survivor's benefits under the Social Security Act, in light of significant changes in the applicable law not considered by the court below. Counsel for petitioners has authorized us to state that he joins in seeking this disposition.

1. Petitioners are illegitimate children, or persons claiming on their behalf, who seek survivor's benefits under the Social Security Act. Illegitimate children may qualify for survivor's benefits in a number of ways. See, *e.g.*, 42 U.S.C. 416(h)(3)(C). Petitioners claim under Section 216(h)(2)(A) of the Act, 42 U.S.C. 416(h)(2)(A), which provides that an illegitimate child will have the same right to survivor's benefits as a legitimate child if he has "the same status

relative to taking intestate personal property" as a legitimate child under "such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual * * * was domiciled at the time of his death * * *." Thus, petitioners' claims are dependent upon the construction of state intestacy law.

In determining eligibility for survivor's benefits under Section 216(h)(2)(A), the Secretary of Health and Human Services considers the state intestacy statute applicable to those who died at the time of the insured's death. The question presented by this case is whether the Secretary must assess the constitutionality of the applicable state intestate succession statute, even though no state court has declared it unconstitutional. Changes in the intestacy laws of Mississippi and West Virginia have now rendered a ruling on this issue unnecessary to the resolution of petitioners' survivor's benefits claims.

2. a. The insured through whom the Jones petitioners claim was domiciled in Mississippi when he died; the Simms petitioners' insured was domiciled in West Virginia. In our response to the petition, we noted that Mississippi recently enacted a statute, Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982), that expands the intestate succession rights of illegitimate children. Because the court of appeals had not considered the effect of this statute, in our response to the petition (see Resp. Br. 4, 10) we agreed with petitioners (see Pet. 29-30 n.7; Pet. Br. 83-84) that, as to the Jones petitioners, the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982). That statute is explicitly retroactive (Miss. Code Ann. § 91-1-15(2)(d)(ii) (Cum. Supp. 1982)), and on remand the Secretary will not oppose the contention that it applies to the Jones petitioners and that if they satisfy its terms, they will establish their

eligibility for survivor's benefits under Section 216(h)(2)(A). It is accordingly unnecessary for the Court to decide whether the Secretary erred in not determining the constitutionality of the superseded Mississippi inheritance statute.

b. We have now learned that the Supreme Court of Appeals of West Virginia has invalidated the West Virginia statute governing illegitimate children's inheritance rights. *Adkins* v. *McEldowney*, 280 S.E.2d 231 (1981). Both we and petitioners (see Pet. Br. 84-85) were unaware of this decision until after the Court granted the petition for a writ of certiorari in this case, and the court of appeals did not consider the effect of this decision. Under *Adkins* v. *McEldowney*, it appears that illegitimate children in West Virginia have the same inheritance rights as legitimate children as long as they can establish paternity. See 280 S.E.2d at 233. In this case, the Simms petitioners have established paternity to the Secretary's satisfaction. See Pet. App. 5a. On remand, the Secretary will not oppose the contention that under West Virginia law the rule of *Adkins* should apply to the Simms petitioners, whose actions to review the Secretary's denial of their claims were pending before the court of appeals at the time *Adkins* was decided. See generally *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971); *Linkletter* v. *Walker*, 381 U.S. 618, 625-627 & n.10 (1965); *Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979). Consequently, the Simms petitioners will be able to establish their eligibility for survivor's benefits under Section 216(h)(2)(A), and this Court's decision of the question presented by the petition would not affect the outcome of their suit.

We accordingly believe that the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Miss. Code Ann. § 91-1-15 (Cum. Supp. 1982) (as to the Jones petitioners) and *Adkins*

v. *McEldowney, supra* (as to the Simms petitioners). Petitioners have requested the same disposition (Pet. Br. 83-87). See, *e.g., Montana Power Co.* v. *EPA*, 434 U.S. 809 (1977); *Omaha National Bank* v. *Nebraskans for Independent Banking, Inc.*, 426 U.S. 310 (1976); *Town of Lockport* v. *Citizens for Community Action*, 423 U.S. 808 (1975).

3. We would also note that the question presented by the petition is unlikely to recur frequently in the future. As we stated in our response to the petition (Resp. Br. 8), that question has arisen because *Trimble* v. *Gordon*, 430 U.S. 762 (1977), invalidated a common form of state intestate succession statute on the ground that it unconstitutionally discriminated against illegitimates. Most states have, by statute or court decision, attempted to conform their intestate succession laws to *Trimble* (see Pet. 22-23 & n.5). The petition identified only two states, including West Virginia, that had not done so (Pet. 22 n.4), and petitioners now agree that West Virginia had, in fact, done so. To the extent the new state statutes or decisions are retroactive, they wholly resolve the issue presented by the petition; even if they are not retroactive, they ensure that the number of claimants affected will diminish. Thus, there is plainly no reason for the Court to decide this issue in a case in which its resolution is unnecessary.

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Miss. Code

Ann. § 91-1-15 (Cum. Supp. 1982), as to the Jones petitioners, and in light of *Adkins* v. *McEldowney, supra*, as to the Simms petitioners. As we noted, both the Secretary and petitioners agree that this is now the appropriate disposition of this case.

REX E. LEE
Solicitor General

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